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MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-48

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Petitioners*

v.

PILOT FREIGHT CARRIERS, INC., *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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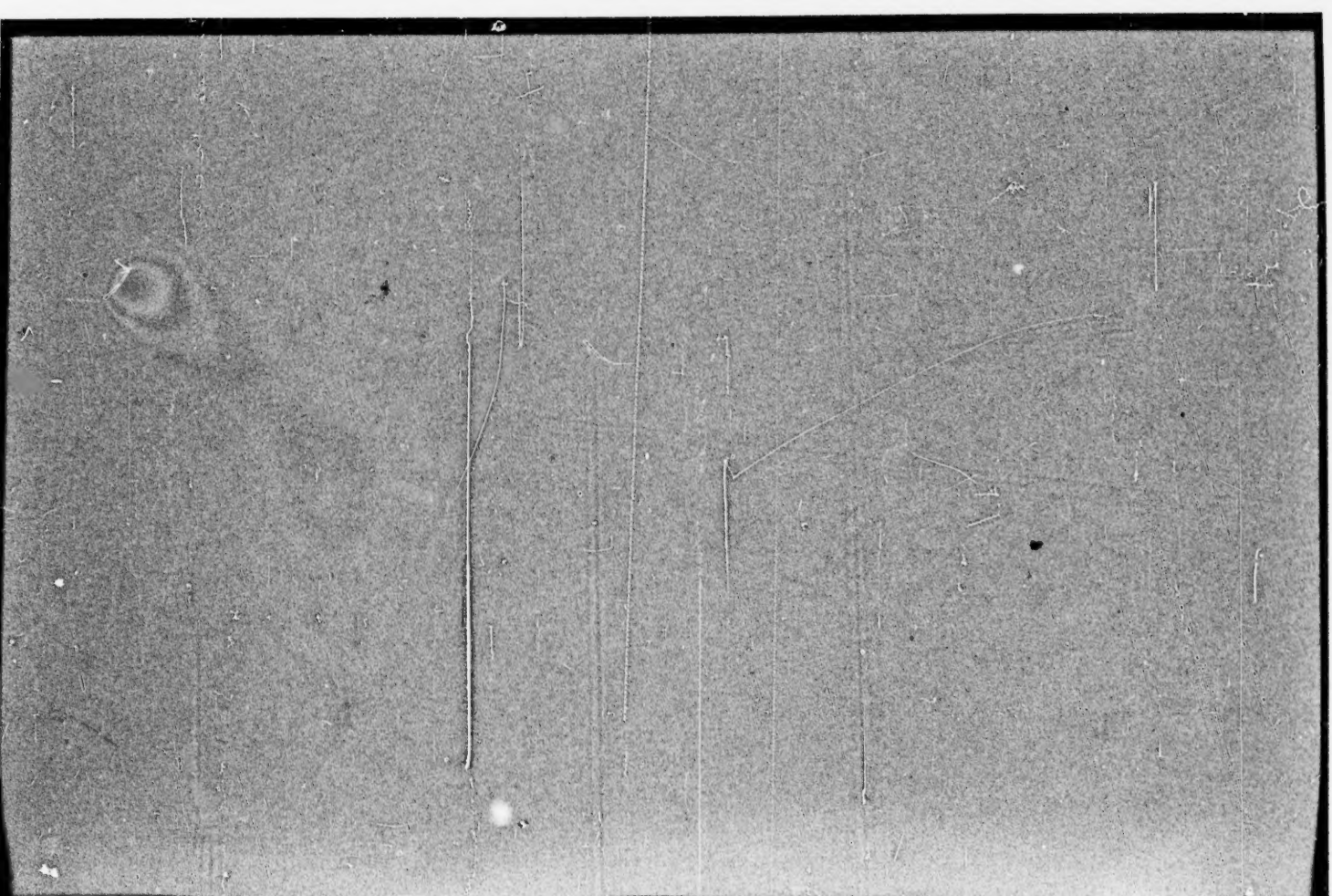

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v.

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Petitioners Local 391, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, R. V. Durham, J. H. Church, and James William Lauck, pray that a writ of certiorari issue to review the

judgment of the Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States District Court for the Middle District of North Carolina is unreported. It is reprinted in App. A, pp. 1a-19a *infra*. The order of Circuit Judge Craven staying the order of the District Court pending appeal is unreported. It is reprinted in App. B, pp. 20a-24a *infra*. The opinion of the Court of Appeals for the Fourth Circuit is reported at 86 LRRM 2337. It is reprinted in App. C, pp. 25a-29a, *infra*.

JURISDICTION

The judgment of the Court of Appeals for the Fourth Circuit was entered on May 3, 1974. It is reprinted in App. D, p. 30a *infra*. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Does a Court of the United States have jurisdiction, notwithstanding § 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C., § 104, to restrain a union from engaging in activity specified and protected therein, where:

(a) the protected activity is in furtherance of a labor dispute which is not arbitrable under a collective bargaining agreement, and only the right to engage in such activity is claimed to be arbitrable by the party seeking the injunction; and

(b) the language in the collective bargaining agreement expressly excepts from the no-strike clause the right to engage in the form of protected activity which is sought to be enjoined?

STATUTES INVOLVED

This case involves § 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104, and § 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. § 185(a). These provision are reprinted in App. E, p. 31a, *infra*.

STATEMENT OF THE CASE

1. The Factual Background.

Respondent Pilot Freight Carriers, Inc. (Pilot), is a common carrier of general commodity freight operating in and across various states under certificates of convenience and necessity issued by the Interstate Commerce Commission. (F. 1,[1] p. 1a, *infra*.); Petitioner Local 391 is a labor organization affiliated with petitioner International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (International). (F. 2-3, p. 2a, *infra*). Local 391 represents Pilot's employees in various bargaining units in North Carolina, and is signatory to current collective bargaining agreements with Pilot. (F. 6, p. 3a, *infra*.)

The present dispute arises out of a strike by the International's Jacksonville affiliate, Local 512, to enforce a demand for recognition by Pilot's Jacksonville employees. (F. 11, p. 5a, *infra*)[2] In support of that

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[1] "F." refers to the Findings of Fact of the District Court in its order granting a preliminary injunction, App. A, *infra*.

[2] The National Labor Relations Board has issued a complaint alleging that by refusing to recognize and bargain with Local 512 and related conduct Pilot has violated §§ 8(a)(1), 8(a)(3), and 8(a)(5) of the Act, NLRB cases 12-CA-6267 and 12-CA-6288. See also *Boire* v. *Pilot Freight Carriers, Inc.*, 86 LRRM 2976 (M.D.Fla., June 28, 1974), granting in part and denying in part the Board's petition for preliminary relief under § 10(j) of the Act.

strike Local 512 established picket lines at Pilot's operations outside Florida. (Id.) On February 26, 1974, one such picket line was set up at the entrances of Pilot's terminal at Kernersville, North Carolina, with pickets carrying signs reading "PILOT FREIGHT CARRIERS, INC., JACKSONVILLE, FLORIDA UNFAIR. REFUSE TO BARGAIN FOR JACKSONVILLE, FLORIDA EMPLOYEES WITH TEAMSTER'S LOCAL UNION 512." (id.) A substantial majority of Pilot's employees represented by Local 391 have refused to cross the picket line (F. 11, pp. 5a-6a, *infra*).

On March 1, 1974, Local 391 issued a notice to its members ordering them not to become involved in the picket line but indicating that those employees who honored the picket line were relying upon Article 9 of the N.M.F.A. (quoted at pp. 5-6, *infra*) which reserves the right of employees not to cross a primary picket line. (F. 12, p. 6a, *infra*). Pursuant to Article 12, § 5(a) of the International Constitution, out-of-work benefits have been paid by International to about 1100 members of Local 391 because of their honoring the picket line involved in this case. Local 391 also directly supplements the payment made by International. The payments began, pursuant to the International constitution, two weeks after the picket line was established. (F. 5, pp. 2a-3a).

Most of Pilot's employees represented by Local 391 are covered by the National Master Freight Agreement (N.M.F.A.) as supplemented by the Over-the-Road and City Cartage Supplemental Agreements (Supplemental). Employees in other bargaining units are covered by the Carolina Automotive Maintenance Agreement (Maintenance) and the Kernersville Ter-

minal and Maintenance Office Agreement (Office). Directly involved are Articles 8 and 9 of the N.M.F.A. and Article 44 of the Supplement to N.M.F.A.[3]

Article 8 of the N.M.F.A. provides for the processing of all grievances or questions of interpretations arising under the N.M.F.A. or supplements. It specifically provides for mandatory use of the grievance machinery in Section 1(a) for "All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement, (or factual grievances arising under the National Master Agreement) . . ." and in Section 1(b) that "Any matter which has been referred pursuant to Section 1(a) above, or any question concerning the interpretation of the provisions contained in the Master Agreement, shall be submitted to a permanent National Grievance Committee . . . ." Further, Article 8, Section 2(b) provides:

> The question of whether the International Union . . . or the Local Union, separately or jointly, participated in an unauthorized work stoppage slowdown, walkout or cessation of work in violation of this Agreement by calling, encouraging, assisting ing or aiding in such stoppage, etc., in violation of this Agreement shall be submitted to the grievance procedure at the national level, prior to the institution of any damage suit action.

Article 9 (N.M.F.A.) provides:

> (1) It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon any property involved in a primary labor

[3] The corresponding provisions in the Maintenance and Office Agreements are "similar" (F. 10, p. 5a, *infra*), and we shall therefore refer throughout only to the N.M.F.A. and Supplemental Agreements.

dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and including primary picket lines at the Employer's places of business.

Article 44 (Supplemental) provides:

. . . that there shall be no strikes, lock-outs, tie-ups, or legal proceedings, without first using all possible means of a settlement as provided for in this Agreement . . . (F. 7-9, pp. 4a-5a *infra*)

2. PROCEEDINGS BELOW

A. Proceedings in the District Court

Pilot brought this action against the International, Local 391 and some of Local 391's officers, employees, and members under § 301 LMRA.[4]

The Amended Complaint alleged that contracts between it and the defendants[5] expressly provide that 'there shall be no strikes, lockouts, tieups, or legal proceedings without first using all possible means of settlement as provided for in this Agreement of any controversy which might arise' " (¶ 6).

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[4] Pilot brought related suits for injunctions in five states. See *Pilot Freight Carriers, Inc.* v. *Local 560, Int. Bro. of Team.*, 373 F.Supp. 19, 27, n. 3 (D.N.J.). In the latter case Judge Stern, in a thorough and reasoned opinion, denied injunctive relief, and pursuant to F.R.Civ.P. 41(b), dismissed Pilot's complaint. The federal court in Georgia dissolved a preliminary injunction after the National Grievance Committee had determined that Pilot had violated Article 9 of the N.M.F.A. by seeking that injunction. (See F. 14, pp. 6a-7a, *infra*.) In Massachusetts Pilot was denied all relief; in New York and Virginia *ex parte* temporary restraining orders issued by state courts were dissolved on removal by federal courts.

[5] In the courts below the International urged that it is not a party to the agreements with Pilot; we do not pursue that issue in this Petition.

Pilot further alleged the establishment of the picket line at the entrance of Pilot's Kernersville Terminal, that "a strike occurred which brought normal operations at [Pilot's] terminal to a halt" (¶ 9), and that it is willing to arbitrate and has filed grievances to determine whether the unions have a contractual obligation not to honor the picket line.[6] Pilot prayed for injunctive relief as well as $10,000,000 damages.

After a hearing, the District Court entered a "Preliminary Injunction", App. A, *infra*. The Court made findings of fact, summarized above. On the merits the Court ruled that it was empowered to grant an injunction notwithstanding § 4 of the Norris-LaGuardia Act.

The Court reasoned that it is an arbitrable matter whether the refusal to cross the picket line was in violation of the agreement, and that this conduct could therefore be enjoined pending arbitration (see pp. 9a-14a, *infra*). In so ruling the Court followed the prior Fourth Circuit decision in *Monongahela Power Co.* v. *Local 2332, International Brotherhood of Electrical Workers, AFL-CIO-CLC*, 484 F.2d 1209 (hereafter "*Monongahela*").

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[6] The latter allegation was contained in ¶ 10 of the Complaint, which, because it is the focus of the legal issue here, we quote in full:

> "The defendants, nor any of them, have [sic] filed any grievance according to the existing contract, if indeed any of them have grievances, but have exerted coercive action in deliberate, willful and calculated violation of existing collective bargaining agreements. Plaintiff is willing to arbitrate the dispute created by the defendant labor organizations, and has filed grievances for the purpose of determining whether the employees covered by the aforesaid agreements have contractually bound themselves not to honor such a picket line and thereby engage in a work stoppage."

In that case members of the defendant union refused to cross a picket line established by another local of the IBEW in a show of "sympathy and solidarity". The contract between the parties had a broad provision requiring the arbitration of all disputes arising thereunder. The contract also unqualifiedly prohibited strikes, work stoppages, etc. during its term (*id.* at 1210-1211). The Fourth Circuit held that the right of the employees to honor the sister local's picket line was an arbitrable matter and pending such arbitration enjoined that work stoppage (*id.* at 1211-1215).

The District Court here recognized that the contrary view had been taken in *Amstar* v. *Amalgamated Meat Cutters & B. Workmen,* 468 F.2d 1372 (C.A. 5) but properly stated that it was "bound by the precedent of its own Fourth Circuit decisions, as opposed to that of the Fifth Circuit." (p. 8, *infra*). The Court also ruled that *Monongahela* was not distinguishable by virtue of Article 9 of the N.M.F.A. (pp. 9a-11a, *infra*).

The District Court entered a sweeping injunction. In part, the Court: 1) directed defendants, "pending trial of this cause on its merits, or a valid and proper exhaustion of contractual remedies, to end the work stoppage now in effect by forthwith notifying the members of Local 391 * * * that any member who relies upon his alleged contractual rights to refuse to cross such picket line would be acting in violation of this injunction"; 2) directed defendants to "take immediate affirmative action to end the work stoppage and encourage the members of Local 391 not to rely upon their alleged contractual rights in deciding not to cross Local 512's picket line"; and 3) restrained defendants "from taking any action either verbal or financial which would aid, assist, encourage,

or any way support the decision of any member of Local 391 to honor Local 512's picket line at plaintiff's places of business" (¶¶ 1-3, pp. 18a-19a, *infra*). The injunction was conditioned on Pilot's posting of a $150,000 bond and further upon plaintiff's proceeding promptly to "submit for grievance the issues raised before this Court which concern Articles 8 and 9 of the N.M.F.A. and Article 44 of the Supplemental agreements, and the corresponding provisions in the Maintenance and Office agreements." (¶¶ 5, 7, p. 19a, *infra*)

B. Proceedings in the Court of Appeals

The defendants promptly noticed an appeal and sought a stay of the injunction in the Court of Appeals. That stay was granted by Circuit Judge Craven, the author of the *Monongahela* opinion, who observed that that case "presently represents the outer limit of the *Boys Markets* injunction". In Judge Craven's view the presence of Article 9 of the N.M.F.A., which "expressly recognizes the right of any employee to honor a primary picket line", would probably be sufficient to distinguish *Monongahela*, so that the unions would probably prevail on the appeal. (Pp. 20a-22a, *infra*).

In the event, Judge Craven's prediction proved to be mistaken. On May 3, 1974, the panel of the Fourth Circuit which heard the appeal ruled that the

> "relationship between the no-strike clause and the clause allowing individual employees to refuse crossing a primary picket line was, we think, an arbitrable matter, as is Pilot's contention that the underlying dispute, whether the local union or national union had directed or influenced concerted activity not to cross the picket line, as opposed to individual employees' decisions not to cross it." (p. 29a, *infra*)

And, adhering to *Monongahela,* the Court held that the District Court had properly enjoined the work stoppage pending arbitration of that issue. The Court reinstated the District Court's judgment against the union defendants.[7]

C. Subsequent Proceedings

Thereafter, the arbitration proceedings under the three separate contracts which had been directed by the District Court concluded. The National Grievance Committee determined that the work stoppage was not in violation of the N.M.F.A. and Supplemental agreement. The Carolina Bi-State Grievance Committee also ruled in the union's favor under the Office contract and deadlocked in the decision covering the maintenance workers. This terminated the grievance proceedings. The defendants therefore moved to dissolve the preliminary injunction. After some delay, which necessitated further intervention by the Court of Appeals, the District Court on May 30, 1974, dissolved the injunction. It ruled, *inter alia,* that the International was now permitted to pay out-of-work benefits except for the period May 3, 1974 (when the injunction was entered) to May 21, 1974.[8]

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[7] The Court ruled, however, that the District Court had erred in issuing an injunction which required the individual members of Local 391 to cross the picket line and modified the injunction accordingly. See pp. 26a, 29a, *infra.*

[8] The right of the International to pay and the members to receive those benefits pursuant to the International constitution (see p. 4, *supra*) is therefore directly at issue in this proceeding. The controversy is very much alive for three additional reasons: 1) plaintiff had posted a substantial injunction bond (see *Liner* v. *Jafco,* 375 U.S. 301, 305-306); 2) the problem is a recurring one which because of the relatively short duration of strike injunctions is likely to escape review if termination of the injunction were to moot the case (see *id.* at 306-308 and *Super Tire Engineering Corp.* v. *McCorkle,* 94 S.Ct. 1694); and 3) Pilot has noted an appeal from the dissolution of the injunction.

REASONS FOR GRANTING THE WRIT

THE COURT BELOW HAS CONSTRUED BOYS MARKETS v. RETAIL CLERKS, 398 U.S. 235, ERRONEOUSLY AND IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEALS.

The decision of the Fourth Circuit in this case is in direct conflict with decisions of the Third and Fifth Circuits. For the court below reaffirmed its view that conduct protected by § 4 of Norris-La Guardia can be enjoined, although the underlying labor dispute is non-arbitrable, and the only grievance is whether such conduct itself is in breach of contract. See also *Monongahela*, p. 8, *supra*. And the precise employer contention accepted by the Fourth Circuit has been squarely rejected by the Third Circuit in *Parade Publications, Inc.* v. *Philadelphia Mailers U. No. 14*, 459 F.2d 369 (hereafter "*Parade*"), and by the Fifth Circuit in *Amstar* v. *Amalgamated Meat Cutters & B. Workmen*, 468 F.2d 1372 (hereafter "*Amstar*"), as an impermissible extension of this Court's limited accommodation of the strong anti-injunction policies of the Norris-LaGuardia Act "to the Congressional policy favoring the voluntary establishment of a mechanism for the peaceful resolution of labor disputes", *Boys Markets* v. *Clerks Union*, 398 U.S. 235, 253.[9]

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[9] The District Courts are likewise sharply divided. See, *e.g.*, Denying an injunction: *Pilot Freight Carriers, Inc.* v. *Local 560, Int. Bro. of Teams.*, 373 F.Supp. 19 (D.N.J.); *General Cable v. International Brotherhood of Electrical Workers, Local Union 1644*, 331 F.Supp. 478 (D.Md.); *Simplex Wire and Cable Co.* v. *Local 2208 of the International Brotherhood of Electrical Workers*, 314 F.Supp. 885 (D.N.H.); *Ourisman Chevrolet Co.* v. *Machinists*, 77 LRRM 2084 (D.C.D.C.); Granting an injunction: *Associated General Contractors of Minnesota* v. *Construction and General Laborers' Local 563*, No. 3-74-Civ.-56 (D.Minn., March 29, 1974), appeals pending C.A.8, Nos. 74-1273, et al.; *Barnard College* v. *Transport Workers*, 372 F.Supp. 211 (S.D.N.Y.); *NAPA Pittsburg* v. *Automotive Chauffeurs*, 363 F.Supp. 54 (W.D.Pa.), appeal pending C.A. 3, No. 73-1798.

As *Amstar* (see 468 F.2d at 1372) and the cases cited at p. 11, n. 9, *supra,* illustrate, the situation out of which this case arose is familiar in industrial relations: a strike against an employer by employees not covered by a current no-strike obligation and a picket line addressed to other employees of that employer who are covered by a current collective bargaining agreement. And the opinion in *Amstar* persuasively demonstrates that the view there taken, and not that of the court below is in harmony with *Boys Markets:*

> "In attempting to accommodate [t]he literal terms of § 4 of the Norris-LaGuardia Act . . . to the subsequently enacted provisions of § 301(a) of the Labor Management Relations Act and the purposes of arbitration,' the Supreme Court in *Boys Markets* established three prerequisites to jurisdiction in a federal district court to enjoin a strike: (1) the strike must be in breach of a no-strike obligation under an effective collective agreement, (2) the strike must be 'over' an arbitrable grievance, and (3) both parties must be contractually bound to arbitrate the underlying grievance which caused the strike.
>
> The case *sub judice* is entirely outside the scope of the exception to the Norris-LaGuardia Act delineated in *Boys Markets. See* Parade Publications, Inc. v. Philadelphia Mailers Union, Local 14, 3 Cir. 1972, 459 F.2d 369; General Cable Corp. v. IBEW, Local 1614, D.Md. 1971, 331 F.Supp. 478; Simplex Wire and Cable Co. v. IBEW, Local 2208, D.N.H. 1970, 314 F.Supp. 885. The strike by the Chalmette employees was not over a grievance which the parties were contractually bound to arbitrate. Rather, the strike itself precipitated the dispute—the validity under the Union's no-strike obligation of the member-employees honoring the ILA picket line. Were we to hold that the legality of the very strike sought to

> be enjoined in the present situation constituted a sufficiently arbitrable underlying dispute for a *Boys Market* injunction to issue, it is difficult to conceive of any strike which could not be so enjoined. 468 F.2d at 1373, footnote omitted.

The latter point merits special attention, for the *Amstar* Court there recognized that if an injunction is authorized where the validity of the strike action is the sole issue to be arbitrated, the avowedly "narrow" exception of *Boys Markets* would be transmuted into a general repeal of Norris-LaGuardia during the life of a collective bargaining agreement. This insight is confirmed by the employer's tactic in *Parade, supra.* There the union struck during the life of an agreement (which contained broad arbitration and no-strike clauses) over whether the agreement applied at another plant. Parade sought to enjoin the strike, but not to arbitrate the underlying dispute—indeed, it apparently wished to avoid arbitration of the coverage issue. Instead, Parade asserted "that the strike itself clearly created an arbitrable issue of whether the union had violated the general 'no-strike' clause" (459 F.2d at 374). Compare ¶ 10 of Pilot's complaint, quoted at p. 6, n. 6, *supra.* The Third Circuit rejected this contention "for two reasons" (*id.*), of which one is directly in point here:

> "Second, this argument of Parade goes beyond anything decided in the *Boys Market* case. Indeed, if the Diversified situation caused the strike and does not present an issue which the parties have bound themselves to arbitrate, it would run contrary to the rationale of *Boys Market* to grant Parade an injunction. We read the opinion in that case to indicate that arbitration should be encouraged by permitting judicial enforcement of a 'no strike' clause when the underlying issue is arbitrable, but that there should be no injunction if the underlying dispute is not arbitrable." (*id.*)

In short, both the Fifth and Third Circuits have squarely held that *Boys Markets* does not authorize an injunction "when the legality of the strike sought to be enjoined is the alleged arbitrable dispute", because such an injunction "is permissible only if the underlying dispute 'over' which the strike has been called is arbitrable" (*Amstar*, 468 F.2d at 1372-1373). Yet, in the Fourth Circuit, a work stoppage is subject to injunction without a finding that it is "over" an arbitrable dispute, and the only arbitrable issue is the legality of the stoppage.

We emphasize that the Fourth Circuit's rule is not, as the *Boys Markets* holding was deemed to be, essential to preserve "the effectiveness of the arbitration technique as a method peacefully to resolve industrial disputes without resort to strikes, lockouts, and similar devices" (398 U.S. at 252). On the contrary, arbitration has flourished although—perhaps in part, because—it has not been customary for the party which invokes arbitration over an alleged breach of contract to seek an injunction against the breach pending arbitration. If this did become the practice, the courts would continually be brought into labor disputes prior to arbitration and labor grievances, increasing the cost to the parties and further burdening judicial dockets.[10]

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[10] Since employee refusals to cross a picket line are expressly within § 4 of the Norris-LaGuardia Act, affirmance of the decision below would, *a fortiori*, authorize an injunction in favor of a *union* which claims that an *employer* is breaching a contract, and validly asserts the right to arbitrate that claim. To be sure, in some instances, the availability of back pay would justify denial of the injunction on a balancing of the equities. But these will frequently favor the union, as for example, where the breach sought to be enjoined prior to arbitration is a plant closing or a change in working conditions which creates an increased safety or health hazard.

As a condition for the injunction Pilot was directed to arbitrate the question whether the union's activities are in breach of the contract. See p. 9, *supra*. This portion of the District Court's order was in compliance with that portion of the *Boys Markets* opinion which states that "the employer should be ordered to arbitrate, as a condition of his obtaining an injunction against the strike" (398 U.S. at 254). But it also highlights the incongruity of the Fourth Circuit's position and its fundamental inconsistency with *Boys Markets*. For in directing the arbitration, the Court did not, of course, itself determine that the enjoined activity was in breach of the agreement. Yet *Boys Markets* also holds that before granting an injunction *the Court must* determine that "breaches are occurring and will continue, or have been threatened and will be committed" (398 U.S. at 254). See also, *Gateway Coal Co.* v. *Mine Workers*, 414 U.S. 368, 380-387. This protection is of particular importance to a union whose contractual no-strike obligation is not absolute, because some issues are expressly excepted therefrom[11] or, because, as here, the union has expressly reserved the employees' right to engage in some forms of work stoppage. Cf. *Gateway, supra*, id. at 382. For in those situations the risk is maximized that conduct protected by § 4 of the Norris-LaGuardia Act will be enjoined although it is entirely consistent with the union's contractual promise. The National Grievance Committee's award favoring these petitioners (p. 10, *supra*) establishes that the Fourth Circuit's rule has this drastic consequence not only in theory but in reality.

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[11] See, *Martin Hageland, Inc.* v. *United States Dist. Ct. Cent. Dist., Cal.*, 460 F.2d 789 (C.A.9); *Associated General Contractors of Illinois Conference of Teamsters*, 454 F.2d 1324 (C.A.7); *Standard Food Products* v. *Brandenburg*, 436 F.2d 964 (C.A.2).

In short, the holding below *does* "undermine the vitality of the Norris-La Guardia Act", contrary to *Boys Markets,* 398 U.S. at 253.

CONCLUSION

For the foregoing reasons this Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

PILOT FREIGHT CARRIERS, INC., *Plaintiff*

v.

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (hereafter called "391 IBT"); R. V. DURHAM; J. H. CHURCH; T. W. BOGER; D. F. BEASLEY; BOBBY J. VESTAL; JOHN P. HANES; JAMES WILLIAM LAUCK; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (hereafter called "International"), *Defendants*

C-74-69-WS

PRELIMINARY INJUNCTION

This cause comes before the Court on plaintiff's complaint alleging breach of contract and asking for damages and injunctive relief. The particular matter now before the Court concerns plaintiff's request for a preliminary injunction. After considering the pleadings, evidence, and arguments of counsel, the Court enters the following findings of fact, discussion, and conclusions of law.

I.

FINDINGS OF FACT

1. The plaintiff, Pilot Freight Carriers, Inc. (Pilot), is a common carrier of general commodity freight operating across various states under certificates of convenience and necessity issued by the Interstate Commerce Commission and is an employer within the meaning of Section 2(2) of the National Labor Relations Act (N.L.R.A.), 29 U.S.C. § 152(2), and, by its transportation of freight along the east coast of the United States and receiving annual rev-

enues in excess of one million dollars, it is an industry "affecting commerce" within the meaning of Section 2(7) of the N.L.R.A., 29 U.S.C. § 152(7). It is a North Carolina corporation with a principal place of business in Forsyth County of that state.

2. Local 391 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (Local 391) is an organization engaged in the representation of the employees of Pilot with its principal office located in Guilford County in the Middle District of North Carolina. Local 391 is a "labor organization" within the meaning of Section 2(5) of the N.L.R.A., 29 U.S.C. § 152(5).

3. Defendant International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (International) is a "labor organization" engaged in the representation of employees within the meaning of Section 2(5) of the N.L.R.A., 29 U.S.C. § 152(5). Local 391 is an affiliate of International.

4. Defendants Durham and Church are officers of Local 391, and defendant Lauck is an organizer employed by Local 391. Defendants Boger, Beasley, Vestal, and Hanes are members of Local 391 and employees of Pilot.

5. The constitution of International regulates in detail the actions of its local unions. In the area of control, the present constitution does not vary significantly from the ones examined in *International Bro. of Teamsters, Etc.* v. *United States*, 275 F.2d 610 (4th Cir. 1960), and *Great C. Ex., Inc.* v. *International Broth. of Team.*, 350 F.Supp. 1377 (E.D. Va. 1972). Moreover, the present constitution has a provision whereby the General Executive Board can pay out-of-work benefits where it recognizes the strike as a proper one for the payment of benefits. Article XII, Section 5(a) of the constitution continues:

> Benefits shall be paid to all other member employees of the primary employer at all terminals . . . if such

> member employees shall have become unemployed as a direct result of a strike involving other Teamster member employees which strike has been approved pursuant to Section 3, . . .

The General President and General Executive Board may terminate benefits "when satisfied upon facts and information in their possession that the support of a strike or lockout should cease." Out-of-work benefits have been paid by International to about 1100 members of Local 391 because of their honoring the picket line involved in this case. Local 391 also directly supplements the payments made by International. The payments began, pursuant to the provisions of the constitution, two weeks after the picket line was established.

6. Local 391 represents employees of the plaintiff in various bargaining units in North Carolina. Pilot and Local 391 have been parties to labor contracts regulating wages, hours, and terms and conditions of employment of the employees represented by Local 391. Each of said contracts contains a grievance procedure established for the purpose of resolving all disputes between the parties involving the application and interpretation of such agreement. In every case, majority decisions by the grievance committees established by the contracts are final and binding on all parties.

Pilot and Local 391, with the approval of International, are parties to a contract entitled "National Master Freight Agreement" (N.M.F.A.). In addition, Pilot and Local 391 have contracts which supplement the N.M.F.A. These are the Over-the-Road and City Cartage Supplemental Agreements (Supplemental). They are also parties to contracts covering other employees not covered by the N.M.F.A. These contracts are the Carolina Automotive Maintenance Agreement (Maintenance) and the Kernersville Terminal and Maintenance Office Agreement (Office).

7. Article 7 of the N.M.F.A. provides that the grievance machinery "may be invoked only by the authorized Union representative or the Employer."

Article 8 of the N.M.F.A. provides for the processing of all grievances or questions of interpretations arising under the N.M.F.A. or supplements. It specifically provides for mandatory use of the grievance machinery in Section 1(a) for "All factual grievances or questions of interpretation arising under the provisions of the Supplemental Agreement, (or factual grievances arising under the National Master Agreement) . . ." and in Section 1(b) for "Any matter which has been referred pursuant to Section 1(a) above, or any question concerning the interpretation of the provisions contained in the Master Agreement, shall be submitted to a permanent National Grievance Committee . . . ."

Section 2 of Article 8 of the N.M.F.A. provides for determining whether a work stoppage, slowdown, walkout, or cessation of work in violation of the contract is or is not authorized, and if unauthorized, the means for terminating such. Subsection (b) of Section 2 provides for submission to the grievance machinery at the national level the question of whether the International or the local union has met its obligations in stopping an unauthorized work stoppage, and second, whether the International or local union "separately or jointly, participated in an unauthorized work stoppage, slowdown, walkout, or cessation of work *in violation of the Agreement* by calling, encouraging, assisting, or aiding in such stoppage, etc., in violation of this Agreement, . . ." The other provisions of Section 2 further detail the working of the grievance machinery, and when its decisions are binding on the parties.

8. Article 9 of the N.M.F.A. provides:

> (1) It shall not be a violation of this Agreement, and it shall not be cause for discharge or disciplinary action in the event an employee refuses to enter upon

any property involved in a primary labor dispute, or refuses to go through or work behind any primary picket line, including the primary picket line of Unions party to this Agreement, and including primary picket lines at the Employer's places of business.

. . . .

(5) Within five (5) working days of filing of grievance claiming violation of this Article, the grievance shall be submitted directly to the National Grievance Committee without taking any intermediate steps, any other provisions of this Agreement to the contrary notwithstanding.

9. Article 44 of the Supplemental agreement declares:

The Unions and the Employers agree that there shall be no strikes, lock-outs, tie-ups, or legal proceedings, without first using all possible means of a settlement as provided for in this Agreement, of any controversy which might arise. Disputes shall first be taken up between the Employer and the Local Union involved. Failing adjustment by these parties, the following procedure shall then apply:

10. The Carolina Automotive Maintenance Agreement and the Kernersville Terminal and Maintenance Office Agreement both contain provisions similar to Article 44 of the Supplemental agreement and to Article 9, Section 1, of the N.M.F.A. Both contracts provide for mandatory and binding grievance procedures as in Article 44.

11. On February 26, 1974, a picket line was set up at the entrances of Pilot's terminal at Kernersville, North Carolina, with pickets carrying signs reading "PILOT FREIGHT CARRIERS, INC., JACKSONVILLE, FLORIDA UNFAIR. REFUSE TO BARGAIN FOR JACKSONVILLE, FLORIDA EMPLOYEES WITH TEAMSTER'S LOCAL UNION 512." Local 512 has been attempting to gain recognition by Pilot at its operation in Florida. It has set up its picket lines at Pilot's operations in other states. As a result of the picket line the following number of employees have not honored the picket line at the Ker-

nersville terminal: 150 out of 700 over-the-road drivers; 3 out of 225 dock workers; 6 out of 40-50 local drivers; 10-12 out of 150 maintenance employees; and 15-20 out of 75 office employees. Pilot's operations have been severely curtailed.

12. On March 1, 1974, Local 391 put out a notice to its members ordering them not to become involved in the picket line but indicating that those employees who honored the picket line were relying upon Article 9 of the N.M.F.A. which gave the members the right not to cross a primary picket line.

13. On March 1, 1974, Pilot filed grievances requesting an interpretation of whether a concerted work stoppage is in violation of Article 44 of the Supplemental agreement, and of Article 8 of the Maintenance agreement, and of Article X of the Office agreement. On March 22, 1974, Pilot attempted to invoke Section 2(a) of Article 8 in order to determine whether the strikes at its terminals were authorized. The Area Directors for the Southern and Eastern Conference of Teamsters refused to act on the request stating that it was not timely.

14. One of the stipulations of the parties is as follows:

> h. The National Grievance Committee established under the National Master Freight Agreement heard a case involving Pilot and Local 728, Atlanta, Georgia, in Chicago, Illinois, on March 22, 1974. A copy of the transcript of that hearing is attached as defendant 391 IBT's Exhibit V.

The Committee concluded:

> [O]n the basis of the facts presented and on the basis of Pilot Freight Carrier, Inc.'s injunctive proceedings [in federal court in Georgia] presented to the committee, which applies against individual employees covered by the National Master Freight Agreement who were respecting the picket lines established at

Atlanta, Georgia and Dalton, Georgia, Pilot Freight Carrier, Inc. is in violation of the provisions of Article 9.

The Committee did not concern itself with Article 44 of the Supplemental agreement which is involved in this case. It had no jurisdiction over the Maintenance or Office agreements involved here.

15. Pilot's revenue has decreased approximately one half since its employees have honored Local 512's picket line. It is losing about $150,000 a day in revenue.

16. The Court takes notice from its earlier abortive hearing on this matter which was held on March 21, 1974, that Pilot has attempted to resolve its labor problems in good faith.[1]

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[1] This case was removed from state court to this court and defendant Local 391 filed a motion to dissolve the state court's TRO. Plaintiff asked for preliminary injunction and preferential consideration. Upon returning from court in another division of this district in mid-afternoon on Friday, March 8, 1974, the Court conferred with counsel for the parties. Thereafter, negotiations between counsel were conducted until Saturday afternoon, March 9, when the Court heard the parties, in chambers, on defendants' motion to dissolve the state court's TRO. The Court elected to allow the state court's TRO to expire by its own terms on Sunday, March 10. The parties negotiated in good faith the following week but on Monday, March 18, advised the Court that negotiations had terminated, that an amended complaint had been filed making International a party, and that local counsel agreed to waive formal notice and have the preliminary injunction hearing on Thursday, March 21. Counsel for International appeared at the hearing, protested lack of formal notice and advised the Court that International was not in a position to proceed at that time. Rather than to hear the matter twice, the Court instructed the plaintiff to consult with the Clerk of this Court, have the matter scheduled for hearing at an appropriate time and to give adverse parties formal notice. This hearing was held on April 3, 1974.

II.

Discussion

The specific issue before the Court is whether it has authority to issue an injunction in order to enforce the mandatory grievance procedures of the parties' contract. The defendants contend that Section 4 of the Norris-LaGuardia Act, 29 U.S.C. § 104 prohibits the issuance of an injunction. They claim that Local 391 has no dispute with the plaintiff company and that its members are merely exercising their right under Article 9 of the N.M.F.A. to refrain from crossing the picket line set up by members of Local 512. Thus they say that since there is no dispute, there is nothing to arbitrate and thus there exists no ground for issuance of a *Boys Markets* injunction. (*Boys Markets* v. *Retail Clerks Union*, 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970)). In support of that position defendants cite *Amstar Corp.* v. *Amalgamated Meat Cutters & B. Workmen*, 468 F.2d 1372 (5th Cir. 1972), and *Pilot Freight Carriers, Inc.* v. *Local 560, Int. Bro. of Team.*, No. 74-339 (D.N.J. 1974).

Plaintiff, on the other hand, relies upon *Monongahela Pow. Co.* v. *Loc. No. 2332 Int. Bro. of El. Wkrs.*, 484 F.2d 1209 (4th Cir. 1973). (This Court is, of course, bound by the precedent of its own Fourth Circuit decisions, as opposed to that of the Fifth Circuit.) In that case, the workers of a local at one of the company's plant divisions refused to cross a picket line set up by members of a different local who worked at another of the company's divisions. The company brought an action in district court seeking damages and injunctive relief on the grounds that the refusal to cross the picket line constituted a work stoppage which was forbidden by the parties' contract and was in violation of said contract. The contract contained a provision for mandatory arbitration of disputes concerning "the interpretation, application, or claimed violation of any express provision of the Agreement." As in the instant case,

the defendant union claimed that the refusal to cross the picket line was an individual decision not promoted by the union and was protected by Section 7 of the National Labor Relations Act, 29 U.S.C. § 157, and thus was outside the reach of the *Boys Markets* decision. The court concluded that the matter was subject to arbitration, saying: "[w]hile there exists a statutory right of employees to refuse to cross a picket line of another union, 29 U.S.C. § 158(b), this right may be waived, and was waived here, by the action of their union in agreeing to a no-strike clause." (484 F.2d at 1214).

The defendant union contends that the particular factual situation of this case does not fall within that of the *Monongahela* decision since it has Article 9 in its agreement which specifically permits its members to honor a primary picket line. That statement, however, begs the real question before the Court which is whether the parties have agreed to submit the controversy to a mandatory contractual grievance procedure. The decision in *Boys Markets* set out guidelines for district courts to follow in deciding whether injunctive relief is appropriate. The court in *Monongahela* reiterated those as follows:

> (1) the collective bargaining agreement must contain a mandatory adjustment or arbitration procedure; (2) the court must first determine that the strike is over a grievance which both parties are contractually bound to arbitrate; (3) the court must order the employer to arbitrate as a condition of his obtaining an injunction against the strike." fn.14, 484 F.2d at 1214.

The Court concludes that those three criteria exist in this case. Here there is a mandatory grievance adjustment procedure. Article 8 of the N.M.F.A. provides for the submission of all factual grievances and questions of interpretation to the grievance procedure. Article 7 of the N.M.F.A. provides that the grievance machinery may be invoked by both the employer and an authorized union representative.

The N.M.F.A. specifically covers work stoppages and cessation of work in violation of the agreement. Section 2(a) of Article 8 provides for a determination of whether a work stoppage is authorized by the union, and for taking corrective action if it is unauthorized. Section 2(b) explicitly provides for use of the grievance machinery at the national level in case the work stoppage is unauthorized in violation of the agreement.

Moreover, Article 44 of the Supplemental agreements between Local 391 and Pilot prohibits strikes and tie-ups without first resorting to use of the grievance machinery. The Maintenance and Office agreements have similar provisions.

Having found that the parties have a mandatory grievance procedure, the Court must next decide whether there is a dispute or controversy which the parties are bound to arbitrate. The defendants contend that Article 9 of the N.M.F.A. clearly gives their members the right to refuse to cross a primary picket line. They claim that this alleged right is not an arbitrable matter and that the determination of whether Local 512's picket line is a primary or secondary one lies within the exclusive competence of the National Labor Relations Board (Board). The Court concludes otherwise.

The duty of this Court in an action brought pursuant to 29 U.S.C. § 185 in determining the issue of arbitrability is limited to whether the claim of the party seeking arbitration is one which on its face is governed by the contract. *Winston-Salem Printing Press & A.U.* v. *Piedmont Pub. Co.*, 393 F.2d 221 (4th Cir. 1968). It is not within the province of this Court to determine the merits of the controversy, that being a matter for the grievance committee.[2] *Tobacco*

[2] Thus the Court specifically refrains from deciding whether the Local 512's picket line involves a primary or secondary dispute. The Court does note, however, that there is room for argument on

Wkrs. Int. U., Local 317 v. *Lorillard Corporation*, 448 F.2d 949 (4th Cir. 1971); *Local No. 6, B.M.&P. Int. U. of Am.* v. *Boyd G. Heminger, Inc.*, 483 F.2d 129 (6th Cir. 1973); *H. K. Porter Co., Conners Div. W.Va. W.* v. *Local 37, United Steel*, 400 F.2d 691 (4th Cir. 1968).

In the instant case, Article 8 of the N.M.F.A., Article 44 of the Supplemental agreements, and the Maintenance and Office agreements all provide for mandatory use of the grievance machinery either in the case of work stoppages and cessation of work in violation of the contract, or in the case of strikes and tie-ups. The decision of the grievance committee may be binding on the parties. It is abundantly clear from the contract that the parties intended to give up the right to strike or to stop work until they had resorted to their grievance procedure. In fact, the Supreme Court has recently stated in *Gateway Coal Co.* v. *Mine Workers*, — U.S. —, 94 S.Ct. —, 38 L.Ed.2d 583, 596 (1974), n.15, that if the contract makes arbitration the exclusive and compulsory means for resolving disputes, then these same arbitration provisions themselves give rise to an implied no-strike duty. The Supreme Court went on to emphasize the fact that a *Boys Markets* injunction could be issued on the basis of an implied no-strike duty. It said:

> Thus, an arbitration agreement is usually linked with a concurrent no-strike obligation, but the two issues remain analytically distinct. Ultimately, each depends

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both sides of the issue. See: Secondary Boycotts—Ally Doctrine, 13 A.L.R. Fed. 466 (1972), and *Local 391* v. *Vulcan Materials Company*, 208 N.L.R.B. No. 81. It is interesting to note, however, that in *Pilot Freight Carriers, Inc.* and *International Bro. of Teamsters*, 208 N.L.R.B. 138 (a unit determination proceeding) the Board found that the Florida operation was not an accretion to Pilot's existing national collective-bargaining unit using many of the same factors relevant in *Vulcan Materials*. (This determination by the Board is the one for which the court in *Boire* v. *International Brotherhood of Teamsters, etc., infra*, issued an injunction.)

> on the intent of the contracting parties. It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in Boys Market. Absent an explicit expression of such an intention, however, the agreement to arbitrate and the duty not to strike should be construed as having coterminous application. (38 L.Ed.2d at 594-95)

In the case before this Court, not only is there a mandatory and binding grievance procedure, but there also is an explicit no-strike clause. The contract provides in detail how the parties are to proceed when there is a strike or work stoppage. The Court need not examine whether the contract has specifically covered the fact situation in this case. It is enough to say that the parties have entered into a contract which, either by express language or at least by implication, subjects any dispute concerning a strike or work stoppage to the mandatory settlement provisions of the contract. In addition to *Monongahela, see Northwest Airlines, Inc.* v. *Air Line Pilots Ass'n, Inter.*, 442 F.2d 251 (8th Cir. 1971) which also held that the crossing of picket lines was a proper subject of arbitration.

Article 9 of the N.M.F.A. in no way changes this conclusion.[3] It only preserves the right to cross a primary picket

[3] The Court cannot accept the argument that the refusal to cross a picket line does not involve a dispute between the union and the employer which is subject to arbitration. Not only does *Monongahela* conclude otherwise, but in *Gateway Coal Co.* v. *Mine Workers, supra*, the Supreme Court rejected a similar type of contention when it was argued that safety matters were foreign to the arbitration process. The Court concluded: "Certainly industrial strife may as easily result from unresolved controversies on safety matters as from those on other subjects, with the same unhappy consequences of lost pay, curtailing production, and economic instability." 38 L.Ed.2d at 593. In the present case, the dispute clearly involves a matter suitable to the arbitration

line without such action being a violation of the contract. It in no way rescinds the express and implied no-strike clauses in the parties' contracts. *See Gateway Coal Co.* v. *Mine Workers, supra.* In fact, it does not even purport to cover *all* picket lines. In light of Article 9, it would even appear by negative inference that crossing a secondary picket line could be a violation of the contract, and thus the question of whether a picket line is primary or secondary could itself be an arbitrable matter in each dispute. In such case, it would seem self-evident that the parties intended to submit such question to their grievance procedure, rather than immediately resort to self-help. In any event, in order to encourage arbitration and to prevent industrial strife, the Court cannot but conclude that the parties must use their mandatory grievance procedure to settle the dispute over whether an employee has a right to refuse to cross a picket line.

A similar conclusion was reached on similar facts by the court in *NAPA Pittsburgh, Inc.* v. *Automotive Chauffeurs, etc.*, 363 F.Supp. 54 (W.D.Pa. 1973). There, the court had before it a refusal to cross a picket line in a situation similar to the instant case. The parties had a broad arbitration provision in their contract also. They also had a reservation of rights clause in regard to crossing primary picket lines. In granting an injunction, the court stated:

> The Contract contained, under Article XIII, a specific provision for picket lines. In light of this specific provision it would seem that the question of the right to cross a picket line was made part of the Agreement over which the arbitration clause became a compulsory method of procedure which this Court must enforce.

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process. In fact Section 5 of Article 9 of the N.M.F.A. itself provides for the filing of a grievance claiming violation of that article. This positively refutes defendants' contention that a claimed violation of Article 9 does not involve a grievance or dispute arising out of the contract, or that the dispute is not an arbitrable matter.

> It is noted that it is not the Court's role to make an independent examination of the merits of the dispute and we have not done so. We have confined ourselves solely to an analysis of the case at bar through the contractual language of the Collective Bargaining Agreement as set forth by the parties. (363 F.Supp. at 57-8).

In determining whether a dispute is within the mandatory settlement provisions of a contract, the Court is bound to view the language liberally in favor of arbitration. As stated in *Monongahela,* at 1213: "The Supreme Court has stated that courts should liberally construe such agreements, resolve all doubt in favor of arbitration, and order arbitration unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." Here there is no express provision excluding this dispute from the grievance machinery, nor is there a forceful evidence of a purpose to exclude the controversy from grievance. *Gateway Coal Co.* v. *Mine Workers, supra,* n.10, 38 L.Ed.2d at 593. In fact, the contract evidences the opposite conclusion—that the parties actually intended to include these disputes over crossing a picket line within their grievance machinery. (See footnote 3).

The defendant union makes the additional argument that this matter is not the proper subject of arbitration since the resolution of the dispute concerns the question of whether Local 512's picket line is illegal in violation of 29 U.S.C. § 158(b)(4). The union claims that that matter is within the exclusive jurisdiction of the National Labor Relations Board. Assuming this to be the case, it is not unusual that the parties will have contracted to arbitrate an issue that may also fall within the Board's jurisdiction. In fact, this same situation arose before this Court when it was contended that the Florida operations of Pilot were an accretion to its operations in other states. In that case, this Court ordered the issue be submitted to grievance

even though the Board might have, and ultimately did take, jurisdiction of the controversy also. *See Pilot Freight Car., Inc.* v. *International Bro. of Team., etc.*, 353 F.Supp. 869 (M.D.N.C. 1972). When the Board began its unit determination hearing (see footnote 2), it sought an injunction pending decision, and the matter came before the Fifth Circuit in *Boire* v. *International Brotherhood of Teamsters, etc.*, 479 F.2d 778 (5th Cir. 1973). There the court specifically agreed with the position of this Court and held that the arbitrator's decision must ultimately defer to the Board's ruling. Thus as stated in *Radio Television Technical School, Inc.* v. *N.L.R.B.*, 488 F.2d 457, 461 (3rd Cir. 1973): "Although it is the well established policy of the Board to encourage settlement of labor-management disputes through the machinery of arbitration, the Board is not duty bound to defer to every decision of an arbitrator." The court in *Boire, supra*, at 803, noted the advantages of having arbitration take place even when the Board has jurisdiction over the dispute:

> For example, had the arbitrator decided *against* the Teamsters, further Board proceedings quite possibly would have been rendered unnecessary. In addition, in cases such as *Carey*, when the representational question is often strongly tied into contract interpretation rather than a pure unit determination, the need for receiving a final construction of the contract is readily apparent.

In the instant case, the grievance committee's decision only involves Local 391's right to honor the picket line, and as far as the Court can determine, does not purport to affect the right of Local 512 to picket. Thus in this case there appears little chance of direct conflict between the grievance committee's decision and a Board ruling. However, even if there were a real possibility of conflict, that would not be an unusual situation, and it would not very likely dissuade the Court from enforcing the arbitration provisions of the contract.

The Court concludes that the dispute in this case falls under the mandatory grievance adjustment procedure provisions of the parties' contract, and that there is no serious danger that an order enforcing the grievance procedure will undermine the authority of the National Labor Relations Board. Therefore, the Court will order arbitration as a condition for the issuance of an injunction.[4]

Since the three guidelines for issuing a *Boys Markets* injunction, as set out above, have all been met, the only remaining question is whether an injunction would be appropriate in this case under ordinary principles of equity. The Supreme Court in *Boys Markets*, quoting from the dissent of another case, set out the principles as follows: " 'whether breaches are occurring and will continue, or have been threatened and will be committed: whether they have caused or will cause irreparable injury to the employer; and whether the employer will suffer more from the denial of an injunction than will the union from its issuance.' " (398 U.S. at 254, 26 L.Ed.2d at 212). The Court concludes that those conditions for issuance of an injunction are present in this case. The alleged breach of the contract is continuing. The company has been seriously crippled by the refusal of the employees to cross the picket line. Most departments have been almost completely shut down. The Court concludes that the equities of the situation lie in favor of the company. The parties contracted for a mandatory grievance process. That process includes attempting

[4] The defendants make some claim that the decision by the National Grievance Committee (See Finding No. 14) has decided the issue. That decision only involved Local 728 in Georgia, and did not purport to determine Local 391's rights under its contract. It never mentioned Article 44 of the Supplemental contracts before this Court, nor did it or could it affect Pilot's grievances under the Maintenance and Office agreements. Furthermore, while the Court has doubts about the scope of the decision, it is sufficient to note that the decision itself appears to be a less than complete interpretation of Article 9 of the N.M.F.A. The Court concludes that the decision does not affect the present case.

to resolve disputes over the refusal to cross another union's picket line. If the union did not wish to have to go to grievance over whether it could cross a picket line, it could have explicitly exempted the refusal to cross any picket line from the grievance procedure, rather than just exempting the refusal to cross primary lines. *Gateway Coal Co.* v. *Mine Workers, supra.* Having elected only to reserve its rights in regard to primary picket lines, the union may not now be heard to complain because it now has to submit the matter to grievance rather than immediately honoring Local 512's picket line. The strong policy in favor of the arbitration of labor disputes, *United Steelworkers* v. *Warrior & G. Nav. Co.*, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed. 2d 1409 (1960), must prevail over the union's desire to immediately exercise its alleged rights under the contract.

The Court finds that Local 391 is the agent of International. See Finding No. 5 and the cases cited therein. This case appears to present a stronger showing of agency and direct involvement due to International's payment of out-of-work benefits to members of Local 391 because of the work stoppage resulting from employees honoring the picket line of Local 512. Further, the advice given by Local 391 in posters and letter to its members, and the out-of-work supplements, constitute affirmative conduct in support of the work stoppage. It has a duty "under the collective bargaining agreement to do all within its power to terminate any conduct by its members which violated the agreement." *Monongahela, supra,* at 1214-15.

III.

Conclusions of Law

1. The Court has jurisdiction of this matter pursuant to 29 U.S.C. § 185.

2. The dispute or controversy between the parties involving the refusal of those Pilot employees who are members of Local 391 to cross the picket line set up at Pilot's terminals is a matter subject to the mandatory grievance

procedures of the parties' contracts, and thus this Court has authority under *Boys Markets* to issue an injunction.

3. The Court concludes that the equities of the situation favor the employer and that an injunction ought to issue in order that the parties may exhaust their mandatory grievance procedures.

4. The Court concludes that Local 391 is acting as the agent of International in the present situation, and that International is itself directly involved in aiding the members of Local 391.

IT IS, THEREFORE, ORDERED:

1. That defendant Local 391 and defendant International, their officers, agents, attorneys, and persons acting in concert with them be, and hereby are, enjoined and directed, pending trial of this cause on its merits, or a valid and proper exhaustion of contractual remedies, to end the work stoppage now in effect by forthwith notifying the members of Local 391 that the right to cross Local 512's picket line set up at plaintiff's terminals is now a matter which is subject to their grievance procedure and that any member who relies upon his alleged contractual rights to refuse to cross such picket line would be acting in violation of this injunction.

2. That defendant Local 391 and defendant International, their officers, agents, attorneys, and persons acting in concert with them will take immediate affirmative action to end the work stoppage and encourage the members of Local 391 not to rely upon their alleged contractual rights in deciding not to cross Local 512's picket line set up at plaintiff's terminals, and that they are free to resume their work for the plaintiff.

3. That defendant Local 391 and defendant International, their officers, agents, attorneys, and persons acting in concert with them are hereby enjoined and restrained from taking any action either verbal or financial which would aid, assist, encourage, or any way support the decision of any

member of Local 391 to honor Local 512's picket line at plaintiff's places of business.

4. That defendant Local 391 and defendant International, their officers, agents, attorneys, and persons acting in concert with them be, and hereby are, enjoined and restrained from calling or causing any strike, slow-down, work stoppage, or similar concerted activities among the plaintiff's employees during the pendency of this cause because of any of the issues involved herein so as to affect the operations of plaintiff's business.

5. It is a condition of this order that the plaintiff shall file in the office of the Clerk of this Court a bond approved by said Clerk in the amount of $150,000, by which the plaintiff shall undertake and agree that in the event it is finally determined that this order should not have issued, then the plaintiff will pay the defendant such damages, up to the aforesaid amount, as the defendant may have suffered by reason of the issuance of this order.

6. This order shall become effective at 12:00 noon on Saturday, April 6, 1974, or as soon thereafter as the bond required herein is filed by the plaintiff.

7. This order is conditioned upon the plaintiff's proceeding promptly and in due course to comply with the mandatory grievance procedures set forth in the contracts, and submit for grievance the issues raised before this Court which concern Articles 8 and 9 of the N.M.F.A. and Article 44 of the Supplemental agreements, and the corresponding provisions in the Maintenance and Office agreements. This order shall remain in full force and effect pending resolution by the respective grievance committees whereupon application may be made to this Court for further orders in this matter.

/s/ Hiram H. Ward
United States District Judge

April 4, 1974.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No.

PILOT FREIGHT CARRIERS, INC., *Plaintiff*,

versus

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA; R. V. DURHAM; J. H. CHURCH; T. W. BOGER; D. F. BEASLEY; BOBBY J. VESTAL; JOHN P. HANES; JAMES WILLIAM LAUCK; and INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Defendants.*

ORDER

This is a Rule 8 petition brought to me as a single circuit judge to stay an order of the United States District Court for the Middle District of North Carolina. I have determined that it is impracticable to convene a panel of three judges. On April 4, 1974, the district judge enjoined Local 391 and the International Union and others to end a "work stoppage" at Pilot's place of business at Kernersville, North Carolina. Judge Ward stayed his own order to permit the defendants an opportunity to seek a Rule 8 hearing before a circuit judge. I heard the matter on April 5 at Winston-Salem.

I am inclined to believe that the defendants will prevail on the merits of the appeal. This case seems to fall between *Monongahela*[1] and *Amstar*.[2] I think that *Monongahela* presently represents the outer limit of the *Boys Markets* injunction.[3] In *Monongahela*, contrary to the po-

[1] Monongahela Power Co. v. Local No. 2332, IBEW, 484 F.2d 1209 (4th Cir. 1973).

[2] Amstar Corp v. Amalgamated Meat Cutters, 468 F.2d 1372 (5th Cir. 1972).

sition of the Fifth Circuit in *Amstar,* we held that a dispute over the right to stop work without the presence of an initial or underlying dispute might itself be an arbitrable grievance. In *Monongahela* there was no attempted express reservation of the right to strike or otherwise stop work. Here there is, and it may be enough to distinguish *Monongahela.* Article 44 of the Carolina Freight Council Supplemental Agreement is a broad prohibition against strikes without first using all means of settlement. Article 9 of the National Master Freight Agreement expressly recognizes the right of any employee to honor a primary picket line. The two clauses together bring to mind what Mr. Justice Powell has written in *Gateway Coal Co.* v. *Mine Workers:*

> It would be unusual, but certainly permissible, for the parties to agree to a broad mandatory arbitration provision yet expressly negate any implied no-strike obligation. Such a contract would reinstate the situation commonly existing before our decision in *Boys Market.*

38 L.Ed.2d 583, 595 (1974).

I think there is some degree of probability that the ultimate result on appeal will be to adhere to *Monongahela* but to distinguish its application by reason of Article 9.

If it be assumed, however, that *Monongahela* controls this appeal, I think the defendants will likely prevail anyway. Local unions in Atlanta and Dalton, Georgia, submitted an identical dispute to arbitration and obtained from the National Grievance Committee a determination that Pilot violated the provisions of Article 9 by applying for injunctive relief. I interpret this to necessarily mean that the employees did *not* violate Article 44 by refusing, pursuant to Article 9, to cross the primary picket line of Local 512.

As to whether the picket line is primary or secondary, it is enough to note for purposes of this order that Pilot has attempted unsuccessfully to have the NLRB characterize it as illegal secondary activity. Since it is a picket line by a local union of employees working for Pilot and is established only at places of business of Pilot, it would seem on its face not to be secondary.

Under *Boys Markets* a United States District Court may not issue an injunctive order until it first holds that the work stoppage is "over a grievance which both parties are contractually bound to arbitrate." *Boys Markets*, 398 U.S. at 254, *quoting Sinclair Refining Co. v. Atkinson*, 370 U.S. 195, 228 (1962) (Brennan, J., dissenting). The underlying grievance here is the refusal of Pilot to recognize and bargain with Local 512 in Jacksonville, Florida. Because there is no contract, and indeed no legal relationship as yet, between Pilot and Local 512, there is obviously no duty to arbitrate the refusal to recognize and bargain. Thus the only possible arbitrable issue is the relationship between Article 9 and Article 44 and the question of interpretation as to whether Article 9 is an exception to Article 44. It seems to me that it is and that Article 9 removes this case from the application of *Monongahela*. But I need not so decide, for it is reasonably clear that the National Grievance Committee has so held. It is true that the Grievance Committee did not mention Article 44 and its relationship to Article 9, but it is inconceivable that the Committee would not have considered the relationship had it been requested to do so.

It is disheartening that both the plaintiff and the defendants will unquestionably suffer irreparable injury if the stay is granted. Economic loss to the company has been estimated at $150,000 a day. Economic loss to the employees is at the rate of some $200 per employee per week, and some 600 workers have ceased work at Kernersville alone. The economic injury that each party may in-

flict upon the other is tragic. But as far as the ingredient of irreparable injury to the defendants, essential to the granting of a stay order, it is enough to note the public policy of the United States as expressed by the Congress. 29 U.S.C. § 104 protects the right of workers to cease or refuse to perform any work, and 29 U.S.C. § 163 reiterates the purpose of the Congress not to interfere with or impede or diminish in any way the right to strike. Thus a *Boys Markets* injunction necessarily involves irreparable injury to the economic power of a labor union to obtain recognition. Because the Congress has determined that the individual unorganized worker is commonly helpless to exercise actual liberty of contract and that he therefore must be free to associate with his fellows and act through a labor union, including the right to strike, I believe the public interest will be served by granting the stay despite substantial and continuing harm to Pilot.

In summary, I am unable to discern in this case any grievance dispute susceptible of arbitration. The real dispute is whether Pilot should recognize and bargain with Local 512, and the resultant dispute is whether there is the right to honor a picket line—which has been submitted to arbitration and has been decided against Pilot. I believe there is nothing that the courts can do to resolve the status of Local 512. Failing voluntary recognition by Pilot, this question can only be resolved by a bargaining order or an election. The public interest would seem to require that the NLRB either issue a bargaining order, if appropriate under *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969), or require an immediate election.

Thus far, Pilot has sought injunctive relief in at least five United States District Courts. It was initially successful in the suit brought in Atlanta, but that preliminary injunction was subsequently dissolved after the decision of the Grievance Committee. Presently the status of this multistate litigation is that injunctive relief for Pilot has

been denied in all districts except this one. *See Pilot Freight Carriers, Inc.* v. *Local 560, IBT*, Civ. No. 74-339 (D.N.J., April 1, 1974); *Pilot Freight Carriers, Inc.* v. *International Bhd. of Teamsters*, Civ. No. C74-363A (N.D. Ga., April 3, 1974). I have no occasion to reach the question of whether so many efforts in so many districts is wasteful of judicial resources and might be prevented by application of a doctrine of collateral estoppel.

Pursuant to 29 U.S.C. § 110, the appeal is accelerated, and the Clerk is ordered to establish a briefing schedule and schedule the case for hearing at the April 29, 1974, term at Charleston, South Carolina, or the May 6, 1974, term at Richmond, Virginia.

The order of the district court is stayed pending appeal.

This 8th day of April, 1974.

/s/ J. Braxton Craven, Jr.
J. Braxton Craven, Jr.
United States Circuit Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-1454

PILOT FREIGHT CARRIERS, INC., *Appellee*

v.

INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, ET AL., *Appellants*

No. 74-8036

PILOT FREIGHT CARRIERS, INC., *Plaintiff-Appellee*

v.

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, ET AL., *Defendants-Appellants*

Appeals from the United States District Court for the Western District of North Carolina, at Winston-Salem. Hiram H. Ward, District Judge.

Argued April 29, 1974 Decided May 3, 1974

Before HAYNSWORTH, Chief Judge, RUSSELL and WIDENER, Circuit Judges.

David Previant (L. N. D. Wells, Jr., Ian D. Lanoff, Norman B. Smith, Hugh J. Beins, and Renn Drum on brief) for Appellants, in Nos. 74-1454 and 74-8036; J. W. Alexander, Jr., (William Kerns, Blakeney, Alexander and Machen and Deal, Hutchins and Minor on brief) for Appellee in Nos. 74-1454 and 74-8036.

PER CURIAM:

In this case, the district court relied on *Monongahela Power Company* v. *I.B.E.W.*, 484 F.2d 1209 (4th Cir. 1973) and *Boys Markets, Inc.* v. *Retail Clerks Union*, 398 U.S. 235 (1970), in issuing a preliminary injunction enjoining members of Teamsters Local 391 from refusing to cross a picket line set up by Teamsters Local 512 at the Kernersville, N. C. terminal of Pilot Freight, Inc. (Pilot). The employer, and Local 391 are parties to the National Master Freight Agreement, and the district court found that the relationship between Article 44, the no-strike clause of the agreement, and Article 9, a clause which gave individual union members the right to refuse to cross a primary picket line, was an arbitrable matter. Further, the court held that the issue of whether the picketing was primary or not was arbitrable. The union was then successful in obtaining a stay pending appeal under F.R.A.P. 8 from a judge of this court on April 8, 1974. Expedited appeal was granted from both these decisions.

We conclude that the district court reached the correct result in its determination that these matters were arbitrable, but erred in enjoining the individual union members from crossing the picket line. Therefore, we vacate the district court injunction insofar as it applies to individual union members, reinstate the injunction so that Local 391 may not engage in a strike until the issue is further considered by the district court, and, accordingly, vacate the stay pending appeal insofar as it would allow Local 391 to respect the picket line. Further, since we are advised arbitration has already begun on these issues, and is now pending at the level of the Eastern Conference Joint Area Committee, we remand this case for the district court to determine whether the injunction should remain in effect until the arbitration proceeding is final.

The dispute arose when Teamsters Local 512, which was attempting to organize the Jacksonville, Florida, terminal

of Pilot, established roving picket lines at Pilot terminals throughout its system. Many of Pilot's Kernersville employees, who were members of Local 391, refused to cross the picket line and go to work, contending that even though the National agreement had an express no-strike clause, the contract clause allowing them to refuse to cross a primary picket line was an express exception to the no-strike clause. Thus, the union has taken the position from the outset that no arbitrable dispute had arisen, and that whether the picket line was secondary or primary was not arbitrable. The union also contends on this appeal that Pilot has already had these issues arbitrated by the National Grievance Committee in a proceeding which took place while this suit was being heard, and, having lost in that arbitration, cannot arbitrate the same issues again.

Pilot argues that *Boys Markets* and this court's decision in *Monongahela Power Company, supra* control disposition of this case since, even though Article 9 may protect the right of individual employees to respect picket lines, the scope of Article 9 is nevertheless arbitrable. Pilot also contends that the arbitration proceeding already accomplished by the National Grievance Committee did not consider all of the questions raised here. The thrust of Pilot's allegation is that the national Teamsters union has encouraged, financed, fostered and ordered its members to refuse to cross the picket lines of Local 512 which has had the effect of causing a system-wide strike, and that the union has thus attempted to mask this strike as being protected by the rights granted by Article 9 of the agreement. Article 9, Pilot concedes, does give individual employees the right to refuse to cross a primary picket line, but would not allow a directed and concerted refusal on behalf of Local 391.

We first reach the issue of whether Pilot has already had opportunity to arbitrate these issues. That arbitration proceeding was initiated by a grievance filed by Team-

sters Local 728, of Atlanta, Georgia, against Pilot. The factual setting at Atlanta was the same as here, in that Pilot had sought, pending arbitration, an injunction prohibiting Local 728 from respecting Local 512's picket line at their Atlanta facility. A temporary restraining order and order to arbitrate was granted by the district court in Atlanta on March 6, 1974, which order was directed to Local 728, Local 515, and certain individually named members of the two Locals. Local 728 promptly filed its grievance contending that Pilot had violated the rights of its members under Article 9 of the agreement. The grievance was heard by the National Grievance Committee in Chicago, Illinois, on March 20 and 22, 1974. At that hearing, Pilot complained at great length that it had never been informed what specific acts it was charged with doing that violated Article 9. The union responded that Pilot had violated Article 9 by seeking an injunction against individual employees for doing what they were clearly allowed to do under Article 9 of the agreement. The National Committee limited their consideration to this charge, and concluded that Pilot did violate Article 9 by bringing injunctive proceedings against individual employees. After this arbitration hearing, the Atlanta district court, although noting that the National Committee had not dealt with all of the issues in dispute between the parties, nevertheless dissolved the preliminary injunction it had issued because it concluded that Pilot's employees were protected in the factual situation there by Article 9 of the agreement. The Local 728 arbitration, however, necessarily held that the individual employees were protected in their refusal to cross the picket line.

However, we do not think all of the issues raised in the case at hand were arbitrated by that Committee. Pilot presses on appeal that, although individual members, may be protected in their refusal to cross picket lines, the national union acting in concert with the local, may not fur-

ther, encourage, finance, or order its members to refuse to cross such picket lines, and that so doing is a violation of the no-strike clause of the collective bargaining agreement.

The National Master Freight Agreement in the present case does have a mandatory grievance procedure (Article 8) regarding any dispute under the contract. The relationship between the no-strike clause and the clause allowing individual employees to refuse crossing a primary picket line was, we think, an arbitrable matter, as is Pilot's contention that the underlying dispute, whether the local union or national union had directed or influenced concerted activity not to cross the picket line, as opposed to individual employees' decisions not to cross it. On the merits, the arbitration must decide whether Article 9, whatever its scope is found to be, had been complied with or whether the union is using Article 9 as a subterfuge to strike in violation of the agreement. We think the parties intended to submit disputes of this nature to arbitration, and, in any event, we must construe the agreement liberally in favor of arbitration. *United Steelworkers of America* v. *Warrior and Gulf Navigation Co.*, 363 U.S. 564 (1960).

The preliminary injunction of the district court, then, must be vacated as to the individual members, but its preliminary injunction as to the union defendants reinstated. The stay pending appeal is dissolved. Upon remand the district court will consider whether its preliminary injunction should remain in effect as directed to the union defendants during the pending arbitration before the Eastern Conference Joint Area Committee in the proceeding there styled R-125-74, *Pilot Freight Company, Inc.* v. *Local 391.*

The mandate will issue forthwith.

REMANDED.

APPENDIX D

Judgment

Filed May 3, 1974

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 74-8036

PILOT FREIGHT CARRIERS, INC., *Appellee,*

v.

LOCAL 391, INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN, AND HELPERS OF AMERICA; R. V. DURHAM; J. H. CHURCH; T. W. BOGER; D. F. BEASLEY; BOBBY J. VESTAL; JOHN P. HANES, JAMES WILLIAM LAUCK; INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA, *Appellants.*

APPEAL FROM the United States District Court for the Middle District of North Carolina.

THIS CAUSE came on to be heard on the record from the United States District Court for the Middle District of North Carolina, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the preliminary injunction of the district court is vacated as to the individual members, but its preliminary injunction as to the union defendants reinstated. The stay pending appeal is dissolved. Upon remand the district court will consider whether its preliminary injunction should remain in effect as directed to the union defendants during the pending arbitration before the Eastern Conference Joint Area Committee in the proceeding there styled R-125-74, *Pilot Freight Company, Inc.* v. *Local 391*, consistent with the opinion of this Court filed herewith. The mandate shall issue forthwith.

William K. Slate, II, Clerk

/s/ WILLIAM K. SLATE, II
Clerk

APPENDIX E

Statutory Provisions Involved

Section 4 of the Norris-LaGuardia Act, 47 Stat. 70, 29 U.S.C. § 104 provides:

No court of the United States shall have jurisdiction to issue any restraining order or temporary or permanent injunction in any case involving or growing out of any labor dispute to prohibit any person or persons participating or interested in such dispute (as these terms are herein defined) from doing, whether singly or in concert, any of the following acts:

(a) Ceasing or refusing to perform any work or to remain in any relation of employment;

(b) Becoming or remaining a member of any labor organization or of any employer organization, regardless of any such undertaking or promise as is described in section 3 of this Act;

(c) Paying or giving to, or withholding from, any person participating or interested in such labor dispute, any strike or unemployment benefits or insurance, or other moneys or things of value;

(d) By all lawful means aiding any person participating or interested in any labor dispute who is being proceeded against in, or is prosecuting, any action or suit in any court of the United States or of any State;

(e) Giving publicity to the existence of, or the facts involved in any labor dispute, whether by advertising, speaking, patrolling, or by any other method not involving fraud or violence;

(f) Assembling peaceably to act or to organize to act in promotion of their interests in a labor dispute;

(g) Advising or notifying any person of an intention to do any of the acts heretofore specified;

(h) Agreeing with other persons to do or not to do any of the acts heretofore specified; and

(i) Advising, urging, or otherwise causing or inducing without fraud or violence the acts heretofore specified, regardless of any such undertaking or promise as is described in section 3 of this Act.

Section 301(a) of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 U.S.C. §185(a) provides:

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.